

PUBLIC



**Australian Government**  
**Anti-Dumping Review Panel**

# ADRP Report No. 144

Consumer Pineapple from the Republic of the  
Philippines and the Kingdom of Thailand

July 2022

<https://www.adreviewpanel.gov.au>

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## Abbreviations

<b>Term</b>	<b>Meaning</b>
Act	<i>Customs Act 1901</i>
ADC	Anti-Dumping Commission
ADC Report	The report published by the Anti-Dumping Commission in relation to consumer pineapple exported from the Philippines and Thailand and dated 6 September 2021
Commissioner	Commissioner of the Anti-Dumping Commission
Dole	Dole Philippines, Inc
Goods	Consumer pineapple
Inquiry period	1 January 2020 to 31 December 2020
Manual	Dumping and Subsidy Manual November 2018
Minister	The Minister for Industry, Science and Technology (now the Minister for Industry and Science)
Pave	PAVÉ Limited
Philippines	Republic of the Philippines
Golden Circle	Golden Circle Limited
Reinvestigation Report	The report provided by the Commissioner on 24 June 2022 as a result of the reinvestigation.
Review Panel	Anti-Dumping Review Panel
Reviewable Decision	The decision of the Minister pursuant to s.269ZHG(1) of the Act made on 6 October 2021
SEF	Statement of Essential Facts 571 & 572
Siam Food	Siam Food Products Public Company Limited

Thailand	Kingdom of Thailand
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## Summary

1. This is a review of the decision of the Minister for Industry, Science and Technology (the Minister) not to secure the continuation of the anti-dumping measures in respect of consumer pineapple (the goods) exported from the Republic of the Philippines (Philippines) and the Kingdom of Thailand (Thailand) (the Reviewable Decision). The applicant for the review was Golden Circle Limited (Golden Circle).
2. For the reasons set out in this report, I recommend that the Reviewable Decision with respect to exports of consumer pineapple from the Philippines be revoked and that the Minister declare that the Minister has decided to secure the continuation of the anti-dumping measures.
3. With respect to exports of consumer pineapple from Thailand, I recommend that the Minister affirm the Reviewable Decision.

## Introduction

4. Golden Circle applied under s.269ZZC of the *Customs Act 1901* (the Act) for a review of the decision of the Minister relating to the continuation of anti-dumping measures pursuant to s.269ZHG(1) of the Act in respect of consumer pineapple exported from the Philippines and Thailand.
5. The application was accepted and notice of the proposed review, as required by s.269ZZI, was published on 15 November 2021.
6. As Senior Member of the Anti-Dumping Review Panel (Review Panel), I directed in writing that the Review Panel be constituted by me in accordance with s.269ZYA of the Act.

## Background

7. The anti-dumping measures on exports of consumer pineapple from the Philippines and Thailand were due to expire in October 2021. Golden Circle applied to have the measures continued and on 25 January 2021 the Commissioner of the Anti-Dumping Commission (the Commissioner) initiated an inquiry into whether the measures should be continued or not. The inquiry period was 1 January 2020 to 31 December 2020 (the inquiry period).

8. A Statement of Essential Facts (SEF) was published by the Anti-Dumping Commission (ADC) on 19 July 2021 and on 6 September 2021 the Commissioner provided a report to the Minister (the ADC Report).<sup>1</sup> The Commissioner reported that he was not satisfied that the expiration of the anti-dumping measures in respect of exports of consumer pineapple from the Philippines and Thailand would lead or would be likely to lead to a continuation of, or a recurrence of, dumping and the material injury that the anti-dumping measures were intended to prevent.
9. The basis for the Commissioner's finding was stated to be the specific findings that:
  - Golden Circle had been able to achieve a consistently higher sales price on its consumer pineapple, despite imports from the subject countries and other countries being at lower prices.
  - There was no evidence before the ADC indicating that imports from the subject countries impact the prices Golden Circle achieves.
  - The available evidence indicates that Golden Circle's sales of consumer pineapple are within a segment of the Australian consumer pineapple market – a segment in which imported consumer pineapple does not compete.
  - There is no evidence that Golden Circle has lost sales volumes to imported products or would lose sales volumes if the measures expire, with the data indicating that Golden Circle was able to process all of the raw pineapple it acquires.
  - The key factor limiting Golden Circle's ability to increase sales volume is the availability of raw pineapple and there is no evidence to find that imports from the subject countries impact on raw pineapple availability.<sup>2</sup>
10. Based on the findings in the ADC Report, the Commissioner recommended to the Minister that the anti-dumping notices expire. On 6 October 2021 the Minister accepted the recommendation of the Commissioner and declared that he had decided not to secure the continuation of the anti-dumping measures then currently

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<sup>1</sup> Anti-Dumping Commission Report No. 571 & 572

<sup>2</sup> As above, section 7.8 at pages 59-60

applying to consumer pineapple exported to Australia from the Philippines and Thailand.<sup>3</sup>

## Conduct of the Review

11. In accordance with s.269ZZK(1) of the Act, the Review Panel must recommend that the Minister either affirm the reviewable decision or revoke it and substitute a new specified decision. In undertaking the review s.269ZZ(1) of the Act requires the Review Panel to determine a matter required to be determined by the Minister, in like manner as if it were the Minister, and having regard to the considerations to which the Minister would be required to have regard if the Minister was determining the matter.
12. Subject to certain exceptions,<sup>4</sup> the Review Panel is:
  - not to have regard to any information other than relevant information pursuant to s.269ZZK, i.e., information to which the ADC had regard or ought to have had regard when making its findings and recommendations to the Minister; and
  - must only have regard to relevant information and any conclusions based on the relevant information that are contained in the application for review or in any submissions received pursuant to s.269ZZJ.<sup>5</sup>
13. The Review Panel received the following submissions from interested parties pursuant to s.269ZZJ of the Act:
  - Department of Agriculture of the Republic of the Philippines
  - Dole Asia Holdings, Dole Thailand Limited and Dole Phillipines Inc
  - PAVÉ Limited (Pave)
  - The ADC.

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<sup>3</sup> Anti-Dumping Notice No. 2021/117

<sup>4</sup> See s.269ZZK(4).

<sup>5</sup> See above

14. If a conference is held under s.269ZZHA of the Act, then the Review Panel may have regard to further information obtained at the conference to the extent that it relates to the relevant information, and to conclusions reached at the conference based on that relevant information. No conferences were held with interested parties during the conduct of the review.
15. On 12 January 2022, I required the Commissioner to reinvestigate a specific finding in the ADC Report pursuant to s.269ZZL of the Act.<sup>6</sup> The Commissioner was requested to provide a report on the reinvestigation by 12 April 2022. The Commissioner sought and was granted an extension of time to 14 June 2022. A further extension of time was granted to 24 June 2022 and a report on the reinvestigation was provided by the Commissioner on 24 June 2022 (the Reinvestigation Report).
16. In conducting this review, I have had regard to relevant materials including the application for review and documents submitted with the application and to submissions received pursuant to s.269ZZJ of the Act insofar as they contained relevant information or conclusions based on relevant information. I have also had regard to the ADC Report and to documents referenced in the ADC Report. I have also had regard to the Reinvestigation Report as required by s.269ZZK(4A).

## Grounds of Review

17. The grounds of review relied upon by Golden Circle, which the Review Panel accepted, are as follows:
  - The exports of consumer pineapple by Siam Food Products Public Company Limited (Siam Food) were at dumped prices.
  - The ADC erroneously found that Golden Circle's Australian product operated in its own segment of the consumer pineapple market in Australia.
  - The available evidence confirmed that, in the absence of measures, the Australian industry will likely incur material injury from future exports of consumer pineapple from the Philippines and Thailand.

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<sup>6</sup> Letter from the Review Panel to the Commissioner dated 12 January 2022



- The ADC erred in law in its application of s.269ZHF(2) of the Act in stating that the threat of future material injury is not part of the test for the continuation of the measures.

18. Each of these grounds is considered below.

## Consideration of Grounds

### Siam Foods

19. Golden Circle submits that the normal value for the exports by Siam Food should reflect an upward adjustment for export packaging costs which would result in a dumping margin for those exports of 6.4%. The ADC found that the dumping margin for exports by Siam Food during the inquiry period was a negative 5.3%.
20. Siam Food is an exporter of consumer pineapple from Thailand. The ADC conducted a verification of the Exporter Questionnaire provided by Siam Food. As Siam Food did not have any domestic sales of like goods during the inquiry period and there was insufficient information to determine the normal value based on sales by other sellers of like goods, the ADC determined the normal value under s.269TAC(2)(c) of the Act.
21. The normal value of exports determined under s.269TAC(2)(c) is the sum of:
- Such amount as the Minister determines to be the cost of production or manufacture of the goods in the country of export.
  - On the assumption that the goods instead of being exported, had been sold for home consumption in the ordinary course of trade in the country of export – such amount as the Minister determines would be the administrative, selling and general costs associated with the sale and the profit on that sale.
22. In addition, pursuant to s.269TAC(9), the Minister must make such adjustments to the normal value ascertained under s.269TAC(2)(c) as are necessary to ensure that the normal value so ascertained is properly comparable with the export price of such goods.

23. The ADC Report recommended that the Minister make a number of adjustments to the normal value calculations for Siam Food exports, in accordance with s.269TAC(9). These adjustments included an adjustment for export packaging costs. As noted above, the dumping margin found by the ADC for Siam Food's exports was negative 5.3%.
24. Golden Circle contends that there must have been an error in the determination of the dumping margin for Siam Food. The reason for this contention is that in the SEF, a preliminary dumping margin of 6.4% was determined for Siam Food's exports. On 4 August 2021 the ADC published a File Note which detailed a change to the dumping margin for Siam Food from 6.4% to a negative 5.3%. In the calculation of the normal value for Siam Food's exports set out in the File Note, there is no adjustment made for export packaging costs, whereas such an adjustment had been made in the calculation of the normal value for the SEF.
25. As the ADC Report stated that an adjustment had been made to the normal value for export packaging costs, but the dumping margin remained at a negative 5.3%, Siam Food submits there must have been an error. Having reviewed the confidential attachments to the ADC Report setting out the calculations for the normal value of Siam Food's exports, the error appears to be in the statement in the ADC Report as to what adjustments were made.
26. It appears that contrary to the statement in the ADC Report that an adjustment was made under s.269TAC(9) for export packaging costs, no such adjustment was made. The only adjustments which were made are those detailed in the File Note, namely for export inland freight, export port handling charges and export credit. This explains why the dumping margin remained at negative 5.3%.
27. The reason the ADC did not make an adjustment for export packaging costs is not given in the File Note or the ADC Report. It is explained however in correspondence between Siam Food and the ADC in July 2021. This correspondence is also referenced in the confidential attachments to the ADC Report. On the basis of this information, the adjustment was not necessary in order for the normal value to be properly comparable with the export price of Siam Food's exports of consumer pineapple to Australia during the inquiry period.
28. A fuller explanation was given by the ADC in its submission to the Review Panel.

29. Given the above, I do not agree that the ADC should have found that the exports by Siam Food were at dumped prices. Consequently, this ground of review does not support a finding that the Reviewable Decision was not the correct or preferable decision and is rejected.

## The Australian Consumer Pineapple Market

30. Golden Circle contends that the ADC disregarded the price sensitive nature of the consumer pineapple market and incorrectly concluded, because of price, that Golden Circle operates in the consumer pineapple market in its own premium segment and is not affected by the lower prices of directly substituted imported pineapple. Further, it is submitted by Golden Circle that in reaching this conclusion the ADC afforded no consideration to findings in earlier investigations.
31. With regard to the latter submission, Golden Circle relies on the findings made in a 2016 investigation into the continuation of measures on consumer pineapple exported from the Philippines and Thailand. In the report following that investigation, the ADC had found that locally produced consumer pineapple and imported consumer pineapple were directly substitutable with each other and that, while there were perceived quality differences, pricing was an important determinant in consumers' pricing decisions.
32. Golden Circle also relies on other findings in the 2016 investigation (as well as earlier investigations) that consumer pineapple exported from the Philippines and Thailand significantly undercut the Australian industry's selling prices.<sup>7</sup> Two findings from the 2016 investigation are quoted by Golden Circle as being important, namely:

*An analysis of the Australian selling prices relative to the volume of imports, together with discussions with the Australian industry, importers and exporters leads the Commission to conclude that price is a key factor in the purchasing decisions of consumers.*

*The Commission recognises that consumers tended to buy the Golden Circle brand for a number of reasons including perceptions of quality, preference for 'Australian made' and brand loyalty. This enables a premium to be included in*

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<sup>7</sup> As above at page 38

*the prices of Golden Circles' branded products. However, despite this, previous investigations have shown that the dumped goods which undercut Australian selling prices have caused material injury to the Australian industry.*<sup>8</sup>

33. In its application, Golden Circle contends that not only is the consumer market in Australia not segmented but that Golden Circle is affected by the lower prices of directly substitutable imported pineapple. It argues that it is incorrect to find that, on the basis of weighted average selling prices, Golden Circle operates in its own segment of the market.
34. According to Golden Circle, the finding should have been that there is only one market of processed pineapple in Australia comprising consumer pineapple in which Golden Circle sells locally manufactured processed pineapple that sells at a premium to imported consumer pineapple (due to quality and local supply loyalty) which is wholly substitutable with imported pineapple. Such imported pineapple undercuts Golden Circle's selling prices due to the lower prices of the imported pineapple from the Philippines and Thailand which, Golden Circle points out, the ADC found was dumped during the inquiry period and would continue to be dumped should the anti-dumping measures be allowed to expire.
35. The finding by the ADC that Golden Circle operates in its own market segment appears to be key to its analysis of the likelihood of material injury due to dumping continuing or recurring if the measures are not continued. This is because it is the basis for the conclusion that imported consumer pineapple does not compete in that market. Hence, the price undercutting by dumped imports does not affect the prices which Golden Circle can obtain for its locally produced product.
36. I have a number of concerns with the analysis relied upon by the ADC to reach this conclusion. The first is that it is, as Golden Circle points out, inconsistent with previous findings by the ADC. The ADC is not bound to follow its previous findings if circumstances have changed in the relevant market since those findings were made. However, if this is the case, I would have expected to find an explanation of what was different in the market during the inquiry period to the market in the earlier inquiries. There is no explanation in the ADC Report for the different conclusion

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<sup>8</sup> ADC Report No. 333, section 7.5.3 at page 39

reached as to the effect of the price undercutting by dumped imported consumer pineapple.

37. My other concern is that the conclusion reached by the ADC in this respect appears to be inconsistent with a finding in the ADC Report itself. In the consideration of whether the locally produced consumer pineapple products are like goods to the goods under consideration (namely imports from the Philippines and Thailand), the ADC relevantly found that the “imported and locally produced goods are commercially alike as they are sold to the same customers and/or compete in the same markets”.<sup>9</sup>
38. I note that in a submission made pursuant to s.269ZZJ of the Act, Pave provided certain data in an attachment to its submission. It is submitted that this data supports the ADC’s analysis as to market segmentation. It was not, however, clear to me that this data was relevant information within the meaning of s.269ZZK of the Act and therefore information to which the Review Panel could have regard.
39. The concerns expressed above with regard to the ADC’s conclusions in the ADC Report on this issue were part of the reasons I requested the reinvestigation by the Commissioner.<sup>10</sup>

## The Reinvestigation

40. As noted above, the Commissioner provided the report on the reinvestigation on 24 June 2022. As a result of the reinvestigation, the report found that the Commissioner:
  - was satisfied on reviewing the analysis in the ADC Report, that a future-oriented analysis of whether material injury would be likely to continue or recur was considered in the ADC Report (despite the language of section 269ZHF(2) of the Customs Act 1901 not referring to ‘threat’);
  - was satisfied that the imported and locally produced goods are commercially alike and that, while Golden Circle achieves a price premium in the market, the existence of a price premium does not place Golden Circle in a market

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<sup>9</sup> REP 571 & 572, section 3.5 at page 16.

<sup>10</sup> Letter from the Review Panel to the Commissioner dated 12 January 2022

segment where it cannot be impacted by the potentially injurious effects of lower priced competition;

- was satisfied that the expiration of the anti-dumping measures in respect of exports of the goods from the Philippines would lead, or would be likely to lead, to a continuation of, or a recurrence of, the material injury that the anti-dumping measures are intended to prevent;
- was not satisfied that the expiration of the anti-dumping measures in respect of the exports of the goods from Thailand would lead, or would be likely to lead, to a continuation of, or a recurrence of, the material injury that the anti-dumping measures are intended to prevent.<sup>11</sup>

41. With respect to the market segmentation finding in the ADC Report, I note that the Commissioner found, as a result of the reinvestigation, that:

- the imported and locally produced goods compete in the same market as they are sold to the same wholesale customers; presented for sale in the same retail environments; have the same end uses; and are directly substitutable goods;
- Golden Circle achieves a price premium in the market on its proprietary label product; and
- despite this price premium the nature of the goods means that Golden Circle is not in a market segment where it cannot be impacted by the potentially injurious effects of lower priced competition.

42. I also note that during the reinvestigation, the ADC twice called for submissions from interested parties, including after it had published a preliminary reinvestigation report which contained its preliminary findings to the above effect. Hence, interested parties have had an opportunity to comment on the Commissioner's new findings.

43. One of the interested parties, Dole Philippines Inc (Dole), made a submission to the ADC in response to the preliminary investigation report, which referred to the information provided by Pave to which I have referred above. Dole submitted that

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<sup>11</sup> Reinvestigation Report, section 1.2 at page 4

the scan data relied upon by Pave in its submission provides ‘cogent objective evidence from an independent marketing source that demonstrates that there is no significant cross elasticity of demand that might result in causing injury of a material degree’.<sup>12</sup> Dole also submitted that the market in 2022 was very different to that applying before 2017, particularly as regards Golden Circle exiting the private label supply due to the limited raw pineapple supply. According to Dole, Golden Circle’s focus on its premium priced product, and the increase in raw pineapples costs, has accentuated the divide between Golden Circle and imports.<sup>13</sup>

44. The ADC did agree with Dole that there has been a change in the characteristics of the Australian market. However, the ADC did not consider that this change by itself altered its finding that imported and locally produced goods were directly substitutable and compete in the same market, which, during the inquiry period, had three identifiable price tiers.<sup>14</sup>
45. The ADC concluded that the price premium achieved by Golden Circle was not infinite. The data did not, according to the ADC, mean that the price tiers operated in complete independence and that Golden Circle operated in its own market segment unaffected by price competition.<sup>15</sup>
46. I am satisfied that the analysis by the ADC as part of the reinvestigation supports this ground of review and that this is one of the reasons the Reviewable Decision was not the correct or preferable decision with respect to exports from the Philippines.

## Likelihood of Injury Continuing or Recurring

### Golden Circle’s Contentions

47. In its application Golden Circle notes that the issue of future dumping from the Philippines and Thailand is not in dispute. Golden Circle also notes that the ADC found that all imports of the subject goods undercut the Australian industry’s selling prices during the inquiry period and this included imports from the Philippines and Thailand. Despite this, as Golden Circle points out, the ADC found that it had not

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<sup>12</sup> Reinvestigation Report, section 3.5 at page 13

<sup>13</sup> As above

<sup>14</sup> Reinvestigation Report, section 3.6 at page 14

<sup>15</sup> As above at page 15

identified evidence that imports of consumer pineapple had impacted on the prices Golden Circle had been able to achieve.

48. According to Golden Circle, the basis for this latter finding was its alleged inability to demonstrate that, in pricing negotiations with the supermarkets, imports from the subject countries were the cause of it not being able to secure high prices to recover increased costs. Golden Circle considers that it was an absence of examples of pricing offers from retailers of alternative offers to Golden Circle's prices that appears to have been a key consideration in the ADC's findings and the Commissioner's non-satisfaction that future material injury from dumping was likely.
49. Golden Circle relies on the Dumping and Subsidy Manual (Manual) which states that there are a range of factors for consideration and not one factor can provide decisive guidance. The following facts are relied upon by Golden Circle to establish that the Minister's decision was not the correct or preferable decision and that, in the absence of the measures, the Australian industry will likely incur material injury from future exports of consumer pineapple from the Philippines and Thailand, namely:
  - dumping from the Philippines and Thailand will continue;
  - the Philippines and Thailand are the two largest exporters of processed pineapple globally;
  - the co-operative exporters in the Philippines and Thailand have excess capacity with which to supply the Australian market of between 13 and 57 per cent;
  - all import prices from the Philippines and Thailand undercut the Australian industry's selling prices;
  - the Australian market for consumer pineapple is price sensitive;
  - whilst Golden Circle's Australian pineapple sells at a premium to imported pineapple the two products are substitutable;



- the Australian industry is susceptible to increased imports at dumped prices as it embarks on a recovery from a drought-affected period where volumes were constrained; and
- that, in the absence of measures, it is likely that the exporters in the Philippines and Thailand will increase exports to Australia to retard Golden Circle's ability to re-grow displaced volumes over the period 2022-2027 as planned.

## Review Panel's Consideration

50. It is not disputed that Golden Circle does achieve higher prices for its product based on perceived quality differences and loyalty for a local product. This was also the conclusion in earlier inquiries. To reach a conclusion that price undercutting has not caused material injury during the inquiry period, the ADC relies on no correlation between the higher price Golden Circle's product obtains and the price fluctuations of imported consumer pineapple and to the examples of price negotiation between Golden Circle and key retailers.
51. The latter conclusion relies on Golden Circle correspondence with major supermarket customers in which Golden Circle sought to increase selling prices, justifying the request on, among other things, increasing costs of raw pineapple, tin can and labour costs. In the correspondence, the customers reference their own data and analysis of raw pineapple costs in Australia, ultimately negotiating a lower price than Golden Circle had originally sought.
52. The ADC notes that in both examples of price negotiation, there was no reference to selling prices of imported consumer pineapple, nor any perceived pricing pressure due to imports from the subject countries. It is also noted that the ADC has not identified evidence in the application, in submissions from interested parties or raised at the industry verification visit to indicate cheaper imports from the subject countries have placed pricing pressure on the Australian industry.
53. It seems to me that significant weight is placed on the lack of a reference to the prices of imported product in the examples of negotiations with the supermarkets. I am not sure that the correspondence is evidence supporting the conclusion reached by the ADC. The parties to the correspondence are the Australian industry (Golden

Circle) and major customers. Both sides would be aware of the presence in the market of imported product and the significant price undercutting of such imports. The conclusion reached does not take into account that price negotiations take place in that context. It would not need to be spelt out in the correspondence for it to have an effect.

54. The other concern I have with the analysis is that it finds no evidence that the cheaper imports have placed pricing pressure on the Australian industry and yet the ADC also found that Golden Circle suffered injury in the form of price suppression,<sup>16</sup> and reduced profit and profitability across the injury analysis period.<sup>17</sup> If Golden Circle operated in its own segment of the market without competition, then it would be expected to achieve prices which prevented such injury. No explanation is found in the ADC Report to explain why such injury is being suffered if there is no effect on Golden Circle's prices from competition from imported product.
55. It is possible that there is partly an explanation in the market power of the supermarkets, but I am not convinced by the information in the ADC Report that this accounts for the injury, or at least all of it. Further, the market power of the supermarkets could also be increased by the presence of significantly cheaper imports. I also note that injury suffered from dumping does not have to be the only cause of the injury suffered by the Australian injury for measures to be taken.
56. I also find it difficult to accept that there is no cross-elasticity of demand between the locally produced consumer pineapple and the imported product. This would mean that no matter how more expensive the local product became, there were no consumers who would switch to the imported product. I note that previous inquiries found that price was important to consumers.<sup>18</sup>
57. Finally, as the view was taken in the ADC Report that there was no material injury suffered by Golden Circle due to dumping during the inquiry period, it was not surprising that it was also found that it was unlikely that the expiration of the measures would lead to a continuation of material injury. For the reasons given above, I have a number of concerns regarding the finding that no material injury was suffered by the Australian industry during the inquiry period. As discussed

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<sup>16</sup> As above section 5.3.2 at page 29

<sup>17</sup> As above section 5.4.1 at page 29.

<sup>18</sup> REP 333 section 5.6.2 at page 25.

below, s.269ZHF(2) requires the Commissioner to consider what might occur hypothetically if the measures are allowed to expire. If there was material injury suffered by the Australian industry during the inquiry period, then, given the finding that dumping was likely to continue, I would expect that such material injury would continue.

58. Even if material injury was not suffered by the Australian industry during the inquiry period, I am not convinced that the ADC Report adequately addresses the statutory test in s.269ZHF(2). The ADC Report found that dumping was likely to continue. In such circumstances, I would have expected to see an analysis of whether dumped exports were likely to increase given the evidence of excess capacity for some exporters and that exporters have maintained distribution links to the Australian market.<sup>19</sup> An increase in dumped exports could cause both price and volume injury.
59. The analysis in the ADC Report with respect to the likely effect on volumes dismissed the threat that dumping would limit Golden Circle's future volumes. This analysis may however have been affected by the approach taken that a threat of future injury was not part of the test in s.269ZHF(2) which is discussed below.
60. Given the above, I required the Commissioner to investigate the finding that there was not sufficient evidence to support a finding that material injury was likely to be caused by future imports at dumped prices upon the expiration of the anti-dumping measures then applying to imports of consumer pineapple from the Philippines and Thailand.

## The Reinvestigation

61. As a result of the reinvestigation, the Commissioner was satisfied that the expiration of the anti-dumping measures in respect of exports of the goods from the Philippines would lead, or would be likely to lead, to a continuation of, or a recurrence of, the material injury that the anti-dumping measures are intended to prevent. However, with respect to the exports from Thailand, the Commissioner was not satisfied that the expiration of the anti-dumping measures would lead, or would

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<sup>19</sup> REP 571 & 572 section 7.5.4 at page 50.

be likely to lead, to a continuation of, or a recurrence of, the material injury that the anti-dumping measures are intended to prevent.<sup>20</sup>

62. Given the different finding made by the Commissioner with respect to the exports of consumer pineapple from the Philippines and Thailand, I will address them separately.

### **Exports from the Philippines**

63. With respect to the exports of consumer pineapple from the Philippines, the Commissioner has made this finding on the basis that:
- Golden Circle suffered price suppression, and associated injury factors such as reduced profit and profitability during the inquiry period;
  - exports from the Philippines are a proprietary label product that is substitutable for, and competes directly with, Golden Circle's proprietary label product;
  - the volume of exports from the Philippines grew by 25% during the inquiry period such that exports from the Philippines became the dominant source of supply to the Australian market;
  - exports from the Philippines were dumped, and at dumping margins considerably higher than those determined in the most recent review of measures;
  - exports from the Philippines undercut Golden Circle's prices to a significant extent;
  - the injury suffered by Golden Circle during the inquiry period was material and can be attributed to the presence of dumped goods from the Philippines in the market; and

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<sup>20</sup> Reinvestigation Report, section 1.2 at page 4

- in the absence of measures Golden Circle is likely to continue to suffer material injury in the form of price suppression and associated injury factors due to dumped exports from the Philippines.<sup>21</sup>
64. The ADC received a number of submissions in response to its preliminary finding with respect to the exports from the Philippines. The Government of the Philippines submitted that the material injury suffered by Golden Circle could not be attributed solely to the importation of consumer pineapple from the Philippines. Its submission pointed to other factors which it claimed were the cause of injury to Golden Circle and asserted that, in view of these factors, the material injury on Golden Circle was not a direct consequence of the importation of consumer pineapple from the Philippines.<sup>22</sup>
65. Dole submitted that over the last 20 years the focus of pineapple production in Australia has shifted toward supplying the fresh pineapple market rather than the canned pineapple market and that supply constraints are overwhelmingly the dominant factor governing Golden Circle's economic performance. Its submission also relied on the scan data provided by Pave which, it claimed, demolished the ADC's finding that Golden Circle's economic performance is sensitive to pricing of imports. It also claimed that factors other than dumping must be the cause of injury to Golden Circle and that those other factors include the volume and price of imports from other countries, a static overall market, imports of the goods by Golden Circle and Golden Circle's withdrawal of a number of product lines from the market.<sup>23</sup>
66. As a result of the reinvestigation, the ADC rejected the retail sales analysis in the ADC Report that led to the conclusion that changes in the prices of the goods from the Philippines have not influenced the prices that Golden Circle is able to achieve. It considered that two issues raised by the Review Panel were of significance. The two issues were cross-elasticity of demand and the power of the supermarkets and the point of injury to the Australian industry.

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<sup>21</sup> Reinvestigation Report, section 4.1.1 at page 17

<sup>22</sup> As above, section 4.5.1 at page 21

<sup>23</sup> As above, section 4.5.3 at pages 21-22

67. With respect to cross-elasticity of demand, the ADC referred to its finding on this issue which I have referenced above.
68. When it considered the power of the supermarkets and the point of injury to the Australian market, the ADC noted that the supermarkets have increased the retail selling price to a significantly greater extent than the price they pay Golden Circle for its product. This, according to the ADC, indicated that the pricing power of the supermarkets could allow them to increase the profit margins they can attain to the detriment of their suppliers and could be a cause of the price and profit injury suffered by the Australian industry.
69. The ADC noted that price suppression occurs at the point of transaction between the seller and the buyer of the goods, not at the point of resale of the goods by the buyer of those goods. As such, the price suppression experienced by Golden Circle must be assessed within the context of the price negotiation between Golden Circle and the supermarkets.
70. On reconsideration, the ADC concluded that the supermarkets' access to lower priced imported goods must be a relevant consideration and that all wholesale market participants are aware of the presence of the imported product in the market. In that context, it was not necessary to have the direct evidence of the type envisaged by the ADC Report. Rather, the ADC's analysis of the operation and composition of the market, and price and volume trends in the market, supports its finding.
71. The Reinvestigation Report sets out the analysis of the range of factors relevant to the assessment of the likelihood that material injury would be caused by future imports at dumped prices. It examined the likely effect on sales volumes and concluded that the expiration of the measures would not necessarily have injurious effects on Australian industry's sales volumes, which was substantively similar to Dole's submission.
72. The analysis of the likely effect on price with respect to exports of consumer pineapple from the Philippines was that a number of factors provided the supermarkets with considerable leverage to suppress the price that Golden Circle could expect to receive for its product. The ADC determined that Golden Circle experienced price suppression during the inquiry period and this was caused by the

significant price advantage available to exports from the Philippines being at dumped prices. The ADC further considered that in the absence of measures it is likely that Golden Circle will continue to suffer material injury in the form of price suppression (and associated injury factors) due to the dumped exports from the Philippines undercutting the prices it can obtain from the supermarkets.<sup>24</sup>

73. I note that in its reinvestigation, the ADC addressed the concerns I had regarding the approach taken with the analysis in the ADC Report, at least with respect to the exports from the Philippines. I agree with the conclusion reached with regard to dumped exports of consumer pineapple from the Philippines and the likelihood of future material injury to the Australian industry from such exports. The analysis and reasoning in the Reinvestigation Report supports the conclusion reached by the ADC.
74. Accordingly, I accept that this ground for review, with respect to the exports from the Philippines, supports the conclusion that the Reviewable Decision was not the correct or preferable decision.

### **Exports from Thailand**

75. The finding by the Commissioner with respect to the exports from Thailand was made on the basis that dumped imports from Thailand were not influencing pricing in the Australian market given those imports account for less than 1% of the market and competed in a market dominated by exports from the Philippines.
76. In its submission in response to the preliminary investigation report with respect to exports from Thailand, Golden Circle submitted that:
- the ADC did not afford any weight to the impact of the measures during the inquiry period which would have acted as a deterrent to Thai exporters; and
  - in the absence of measures Thai exporters, who maintain excess production capacity, will take steps to secure increased market share by reducing prices.
77. As noted above, the reinvestigation found that the expiration of measures would not necessarily have injurious effects on Australian industry's sales volumes. With

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<sup>24</sup> Reinvestigation Report, section 4.7.4 at page 28

regard to the exports from Thailand, the ADC compared, for each exporter found to be dumping during the inquiry period:

- its share of exports from Thailand;
- its share of the Australian market; and
- its landed price (which includes duties) relative to the landed price of undumped exports from Thailand.

78. This analysis reinforced the ADC's view that, in relation to exports from Thailand, undumped exports are the more likely influencer of price in the Australian market.<sup>25</sup>
79. The ADC did not agree with the submission by Golden Circle. Its analysis of the export prices from Thailand for the years from 2019 indicated that export prices from Thailand are not set relative to the measures. From this analysis the ADC also observed that during the inquiry period cheaper priced dumped exports from Thailand did not erode the market share of exporters exporting undumped goods nor of the Australian industry itself.
80. The ADC concluded that undumped exports from Thailand, which account for the vast majority of exports and which have long established distribution links into the Australia market will continue to be the dominant competitive force capable of influencing the economic performance of Golden Circle. On the available evidence, and given dumped exports from Thailand account for such a small portion of the Australian market, the ADC concluded it was unlikely they will influence the price that Golden Circle achieves in the market.
81. I have considered the analysis conducted by the ADC and its conclusions and agree that it is difficult in that context to form the requisite satisfaction required by s.269ZHF(2). The evidence does not support Golden Circle's submission as to the effect of the measures on Thai exports. While the Thai exporters presently subject to measures may, as Golden Circle contends, seek to increase market share by reducing prices, it cannot be concluded on the available evidence that it is more

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<sup>25</sup> Reinvestigation Report, section 4.7.4 at page 31



likely than not that this will happen such that it would cause material injury to the Australian industry.

82. Accordingly, with respect to the exports of canned pineapple from Thailand, I do not accept that this ground establishes that the Reviewable Decision was not the correct or preferable decision.

## Error of Law

83. Golden Circle contends that the ADC erred in law in its application of s.269ZHF(2) of the Act. The basis for this contention is the comment in the ADC Report that the “threat of future material injury” is not part of the test for the continuation of measures. Golden Circle relies on a quote from the decision of the Full Court of the *Federal Court in Minister of State for Home Affairs v Siam Polyethylene Co Ltd*<sup>26</sup> as authority for the contention that the phrase “material injury” when used in s.269ZHF(2) bears the same meaning as it does in Division 1 of Part XVB of the Act (particularly s.269TAE) and those matters set out in s.269TAE(2A) (for the purpose of s.269TAE(1)) at the very least may bear upon the formation by the Commissioner of the state of satisfaction in s.269ZHF(2).
84. Golden Circle notes that s.269TAE, in turn, relevantly speaks of material injury to an Australian industry being “threatened” and refers to s.269TAE(1),(2),(2A) and (2B).
85. The ADC notes in the ADC Report that its assessment of the likelihood of certain events occurring and their anticipated effect, as is required in a continuation inquiry, necessarily requires an assessment of a hypothetical situation. The ADC Report refers to a previous Review Panel report as noting that the ADC must consider what will happen in the future should a certain event, being the expiry of the measures, occur. However, the ADC’s conclusions and recommendation must nevertheless be based on facts.<sup>27</sup>
86. The ADC Report also refers to the Manual to note that a number of factors will be relevant in assessing the likelihood that dumping and material injury will continue or

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<sup>26</sup> [2010] FCAFC 86

<sup>27</sup> REP 571&572, section 7.2 at page 47.

recur and that no one factor can necessarily provide decisive guidance. The latter is a point relied upon by Golden Circle.

87. Given the above, I am not sure what to make of the comment in the ADC Report that the ADC notes that the threat of future material injury is not part of the test for the continuation of measures. It is possibly simply making a point that the language of s.269ZHF(2) does not refer to the “threat” of material injury in such terms. However, it is difficult to understand how a threat of material injury from dumping in the event of the measures not being continued is not part of what is contemplated by s.269ZHF(2). The threat would of course have to be of material injury that is likely to occur should the measures not be continued.
88. The concern caused by the comment in the ADC Report regarding the threat of material injury is heightened by the submission made by the Commissioner to the Review Panel pursuant to s.269ZZJ on this point. In that submission the following comment is made:

*There is no legal basis on which future possible conditions or hypothetical injury are relevant to an assessment of material injury in a continuation inquiry.*<sup>28</sup>

89. A continuation inquiry does include a consideration of hypothetical injury. It is quite possible that the measures in place during the inquiry period are preventing material injury to the Australian industry. After all, that is what is intended by applying the measures and it is contemplated by s.269ZHF(2) in the reference to a recurrence of the material injury.
90. If there is a threat of material injury recurring if the measures are allowed to expire, then such a threat must be considered when conducting an inquiry into whether measures should be continued. I note that in a submission on behalf of Dole Asia Holdings, Minter Ellison contends that considering whether there is a threat of material injury may involve an assessment limited to whether there is a 'possibility' of such injury. The statutory test, it is submitted, requires more – it is a 'likelihood' that must be established to the satisfaction of the Minister.<sup>29</sup> If the level of threat

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<sup>28</sup> Attachment A to the Submission by the Commissioner of the Anti-Dumping Commission dated 15 December 2021 at paragraph 32.

<sup>29</sup> Letter from Minter Ellison to the Review Panel dated 15 December at page 4.

was only a possibility of injury then, I agree, it would not pass the test in s.269ZHF(2). In order to pass the test set by s.269ZHF(2), the material injury threatened would have to be more likely to occur if the measures expired or it was more probable than not that the threat would eventuate.

91. There is also judicial authority that a threat of material injury within the meaning of s.269TG(1) and (2) and s.269TAE(2B) may, in some circumstances, come within the type of material injury referenced in s.269ZHF(2). Subsections 269TG(1) and (2) refer to material injury which is threatened because of dumping and can be the basis for taking measures. Subsection 269TAE(2B) requires that in determining whether or not material injury is threatened to an Australian industry the Minister must take into account only such changes in circumstances as would make that injury foreseeable and imminent unless measures were imposed.
92. In the first instance decision of Justice Rares in *Siam Polyethylene Co Ltd v Minister of State for Home Affairs [No 2]*,<sup>30</sup> his Honour stated “a review under Div 6A of Pt XVB is not intended as a complete replication of the process under Div 3 involved in the initial imposition of anti-dumping measures. But, the continuation review under Div 6A is still directed to the purpose of preventing material injury or the threat of such an injury caused by dumping.”<sup>31</sup> While his Honour’s decision was overturned on appeal, I do not read the judgment of the Full Court as disagreeing with this approach. Indeed, the passages relied upon by Golden Circle in the Full Court decision would appear consistent with this approach.
93. In any event, a consistent legislative intention can be inferred from the language of s.269ZHF(2), as well as that of s.269TG(1) and (2), that the Australian industry does not have to have already suffered or be suffering material injury from dumping for the measures to be applied or continued. It can be readily inferred that the legislative objective is to prevent such injury occurring or recurring.
94. Accordingly, I am concerned that the ADC, in its approach to the task to be undertaken in a continuation inquiry, may have misunderstood what is required. It is not sufficient simply to consider what has occurred during the inquiry period but based on the material and evidence obtained during the inquiry to consider what is

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<sup>30</sup> [2009] FCA 838.

<sup>31</sup> As above at [41]

likely to occur if the measures in place are not continued. This includes a consideration of what hypothetically may happen, including any material injury which may occur if the measures are not continued.

95. The above concern was also a reason for my requirement that the Commissioner reinvestigate the finding that material injury was not likely to be caused by future imports at dumped prices upon the expiration of the anti-dumping measures then applying to imports of consumer pineapple from the Philippines and Thailand.

## The Reinvestigation

96. In the Reinvestigation Report, the ADC noted that it agreed that an assessment of the likelihood, or otherwise, of the continuation or recurrence of material injury in the context of existing measures necessarily requires a future-oriented analysis. The ADC agrees that this, by its very nature, involves consideration of the hypothetical situation that is the absence of measures.
97. However, the Reinvestigation Report goes on to state that contrary to Golden Circle's submission on the ADC's preliminary reinvestigation finding and consistent with Dole's submission, the ADC notes that the language of s.269ZHF(2) does not refer to 'threat', in contrast to the language of s.269TAE. The ADC does however agree that the Australian industry does not have to currently be suffering material injury from dumping for the measures to be continued.
98. I am not sure what is intended by noting that the words of s.269ZHF(2) do not include the word "threat". As I have stated above, if there is a threat of material injury recurring if the measures are allowed to expire, then such a threat must be considered when conducting an inquiry into whether the measures should be continued. That threat would however need to meet the required legislative standard that it was more likely than not to eventuate.
99. The ADC does however appear to accept this. The recognition that a threat of injury from dumping, if the measures are allowed to expire, may be sufficient to continue those measures is implicit in the comment by the ADC that the Australian injury does not have to currently be suffering from material injury from dumping for the measures to be continued.

100. I consider that overall the language of the Reinvestigation Report recognises the statutory task involved in reaching a conclusion for the purpose of s.269ZHF(2). While the language of the ADC Report and the submission made by the ADC may have been confusing, I do not consider that the ADC fell into legal error in reaching the conclusions in the Reinvestigation Report.

101. Accordingly, I do not consider that this ground of review has been established and does not support the Reviewable Decision not being the correct or preferable decision.

## Recommendations and Conclusions

102. For the reasons given above and based on my consideration of the grounds of review, I have concluded that:

- the Reviewable Decision was not the correct or preferable decision with respect to exports of consumer pineapple from the Philippines; and
- with respect to exports of consumer pineapple from Thailand, the Reviewable Decision was the correct or preferable decision.

103. Pursuant to s.269ZZK(1)(b) of the Act, I recommend that the Minister revoke the Reviewable Decision in so far as it related to exports of consumer pineapple from the Philippines and substitute it with a new decision. The new decision I recommend is that:

- Pursuant to s.269ZHG(1)(b) of the Act, the Minister declare that the Minister has decided to secure the continuation of the anti-dumping measures applying to consumer pineapple exported to Australia from the Philippines as at 9 October 2021;
- Pursuant to s.269ZZM(3)(d) of the Act, declare that the dumping duty notice as in force on 9 October 2021 is reinstated; and
- Pursuant to s.269ZHG(4) of the Act, the Minister declare that the dumping duty notice continues in force after 10 October 2021 but after that date, the notice has effect, in relation to particular exporters as if the Minister had fixed specified variable factors in relation to those exporters relevant to the

determination of duty, such variable factors being those recommended by the Commissioner in the ADC Report 571 & 572.

104. Pursuant to s.269ZZK(1)(a), I recommend that the Minister affirm the Reviewable Decision in so far as it related to exports of consumer pineapple from Thailand.



Joan Fitzhenry  
Senior Panel Member  
Anti-Dumping Review Panel  
15 July 2022